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Terry T. Moyer
P.O. Box 1927
Spartanburg, SC 29304

EXAMINER

BEFUMO, JENNA LEIGH

ART UNIT	PAPER NUMBER
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1771

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/071,354
Filing Date: February 08, 2002
Appellant(s): MILLER ET AL.

MAILED
FEB 09 2005
GROUP 1700

Brenda D. Wentz
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed December 14, 2004.

(1) *Real Party in Interest*

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A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Claimed Subject Matter*

The summary of claimed subject matter contained in the brief is correct.

(6) *Grounds of Rejection to be Reviewed on Appeal*

The appellant's statement of the grounds of rejection is correct.

(7) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) *Prior Art of Record*

5,897,952	VIGO et al.	4-1999
5,899,785	GROTEN et al.	5-1999

(9) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

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I. Claims 1, 5, 6, 8 – 10, and 12 – 29 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 21 and 42 of copending Application No. 10/071,297 for the reasons of record.

II. Claims 1, 5, 6, 8 – 10, and 12 – 29 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Groten et al.

Groten et al. discloses a nonwoven fabric formed from very fine continuous filaments (abstract). The nonwoven fabric is formed by extruding and bonding multicomponent fibers simultaneously, which would produce a spun-bonded fabric (column 4, lines 35 – 38). The fibers are then physically or chemically treated to at least partially split the incompatible components into individual filaments (column 4, lines 42 – 45). The incompatible components are made from polyamide and polyester components (Figure 1). Further, the applicant discloses that the product disclosed by Groten et al. is the preferred nonwoven textile material which is chemically modified (specification, page 4, lines 25 – 27). Thus, Groten et al. teaches the claimed features of the nonwoven material.

Additionally, Groten et al. teaches that the fabric can be chemically treated with anti-pilling treatments, hydrophilic treatments, and modification of its feel and luster, as well as modifications of its external appearance such as dyeing or printing (column 5, lines 1 – 9). The hydrophilic treatment would produce a fabric with improved soil release properties, since the polyester component would more easily absorb water and thus, be more easy to wash and remove dirt. Therefore, the fabric would inherently be treated to achieve a fabric with improved pilling resistance, soil release, strength and abrasion resistance properties due to the chemical modifications of the fabric when compared to the untreated fabric.

Although Groten et al. does not explicitly teach the limitations of pilling resistance as measured by ASTM D4790; soil release as measured by AATCC Method 130-200; strength as measured by ASTM D1424, ASTM D5587, or ASTM D5034; and abrasion resistance as measured by ASTM D3886 or ASTM D3885; or increased wearer comfort, appearance retention, and extended useful life due to the lack of pill formation or the lack of staining, it is reasonable to presume that said limitations are inherent to the invention. Support for said presumption is found in the use of similar materials (i.e. a spun-bonded continuous nonwoven fabric, polyester and polyamide) and in the similar production steps (i.e. chemically treating the fabric to achieve soil release and pilling resistance) used to produce the finished fabric. The burden is upon the Applicant to prove otherwise. *In re Fitzgerald*, 205 USPQ 594. In the alternative, the claimed limitations would obviously have been provided by the process disclosed by Groten et al. Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102. Therefore, claims 1, 5, 6, 8 – 10, and 12 – 21 are rejected.

With respect to claims 22 – 29, which recite the intended use of the fabric, it has been held that a recitation with respect to the manner in which a claimed product is intended to be employed does not differentiate the claimed product from a prior art product satisfying the claimed structural limitation. *Ex parte Masham*, 2 USPQ2d 1647 (1987). Therefore, these claims are rejected with claim 1, on which they depend since they fail to add further structure to the claimed textile article itself.

III. Claims 1, 5, 6, 8 – 10, and 12 – 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vigo et al. in view of Groten et al.

Vigo et al. discloses a chemical treatment which produces a fabric comprising soil release, durable press, resistance to static charge, abrasion resistance, pilling resistance, and water absorbency (abstract). The chemical treatment can be applied to all types of fibrous constructions including nonwoven fabrics (column 1, lines 60 – 65). Thus, the treated nonwoven fabric would achieve improved abrasion resistance, pilling resistance, soil release, and strength.

While Vigo et al. teaches the treatment can be applied to various fabric types and fiber types, Vigo et al. fails to teach using a nonwoven fabric made from continuous polyamide and polyester fibers formed by spun-bonding. The features of Groten et al. have been set forth above. Groten et al. is drawn to a spun-bonded fabric which can be chemically treated. Groten et al. teaches that the nonwoven fabric has characteristics and properties that are at least equal to woven and knit fabrics, while being produced by techniques which are clearly more efficient and less costly. Also Groten et al. teaches that the fabric can be chemically treated with anti-pilling treatments, hydrophilic treatments, antistatic treatments, fire resistance treatments, and dyeing and printing treatments which would modify the appearance and properties of the fabric. Therefore, it would have been obvious to one of ordinary skill in the art to use the fabric taught by Groten et al. with the chemical treatment taught by Vigo et al. since Groten et al. teaches that the nonwoven fabric has properties of woven and knit fabric while being less expensive and also teaches that the fabric can be chemically treated to improve various properties such as pilling resistance, etc. Further, Vigo et al. teaches that the chemical treatment can be applied to various fabrics and fiber types including nonwoven fabrics.

Although the limitations of pilling resistance as measured by ASTM D4790; soil release as measured by AATCC Method 130-200; strength as measured by ASTM D1424, ASTM

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D5587, or ASTM D5034; and abrasion resistance as measured by ASTM D3886 or ASTM D3885; or increased wearer comfort, appearance retention, and extended useful life due to the lack of pill formation or the lack of staining, are not explicitly taught by Vigo et al. or Groten et al., it is reasonable to presume that said limitations would be met by the combination of the two references. Support for said presumption is found in the use of similar materials (i.e. a spun-bonded continuous nonwoven fabric, polyester and polyamide) and in the similar production steps (i.e. chemically treating the fabric to achieve soil release, pilling resistance, abrasion resistance and strength) used to produce the treated fabric. The burden is upon the Applicant to prove otherwise. Thus, claims 1, 5, 6, 8 – 10, and 12 – 21 are rejected.

Additionally, claims 22 – 29 are rejected since those claims only recite the intended use of the fabric and fail to add further structural limitations to the fabric.

(10) Response to Argument

I. The applicant has agreed to file a terminal disclaimer once all other issues of patentability have been resolved. (Appeal Brief, page 4).

II. The applicant argues that the untreated fabric of Groten et al. does not inherently have the claimed properties and therefore, Groten et al. would not read on the claimed article (Appeal Brief, pages 5 – 7). It is agreed that the *untreated* article taught by Groten et al. would not have the claimed properties. However, Groten et al. explicitly teaches that the nonwoven fabric can be treated with chemical treatments such as anti-pilling, hydrophilic treatment, antistatic treatment, etc. (column 5, lines 1 – 10). Therefore, Groten et al. teaches a *treated* textile product, and it is the *treated* textile product which is relied on to reject the claimed product. Hence, the examples disclosed by the applicant showing that the *untreated* fabric does not have the claimed

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properties are not sufficient to overcome the current rejections because it is the *treated* product, and not the *untreated* product, which is being used to reject the present claims.

Further, it has been held that as long as there is evidence of record establishing inherency, failure of those skilled in the art to contemporaneously recognize an inherent property, function or ingredient of a prior art reference does not preclude a finding of anticipation. *Atlas Powder Co. v. IRECO, Inc.*, 190 F.3d 1342, 1349, 51 USPQ2d 1943, 1948 (Fed. Cir. 1999). Also, it is noted that when the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not. *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). Thus, the burden has shifted to the Applicant to provide evidence that the properties are not inherent in the prior art materials. *In re Best*, 562 F.2d at 1255, 195 USPQ at 433. In this case, the applicant has not provided evidence that the chemically treated fabric taught by Groten et al. would not have the claimed properties. Therefore, the rejections are maintained.

The Applicant also argues that Groten et al. fails to teach the claimed properties because Groten et al. does not disclose any specific chemicals or combination of chemicals (Appeal Brief, page 7). However, it is noted that the features upon which applicant relies (i.e., specific chemicals or combination of chemicals) are not recited in the rejected claims. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Therefore, the prior art does not need to teach specific chemicals, the product would only need to produce the claimed product and the claimed properties by any mechanical or chemical means. One of ordinary skill would be able to identify any number of known chemicals treatments

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which would produce anti-pilling properties, hydrophilic properties, fire resistance properties, antistatic properties, or a dyed fabric. Groten et al. does not need to teach specific chemicals if one with ordinary skill in the art can readily understand how to achieve the desired properties. Hence, the teaching that the fabric can be chemically treated by these types of chemicals would be sufficient teaching for one of ordinary skill to produce the finished treated product. Thus, the rejection is maintained.


III. The applicant argues that the 103 rejection based on Vigo et al. in view of Groten et al. lacks a prima facie case of obviousness because there is no motivation or suggestion for combining the references to create the applicant's invention (Appeal Brief, pages 9 –10). Specifically, the applicant argues that Vigo et al. discloses a chemical treatment that is far different from the applicant's chemical treatment and would not create the applicant's invention. As set forth above, the applicant is not claiming any specific chemical treatments, but is only claiming the result of the chemical treatments. Thus, it does not matter that Vigo et al. discloses a different chemistry to produce the claimed properties, nor is Vigo required to teach the same method to achieve the claimed properties since the method of producing the properties is also not claimed. In other words, Vigo et al. only needs to teach a chemical treatment which would produce the claimed product, i.e., a treated fabric having improved pilling resistance and stain resistance. Since Vigo et al. discloses that the chemical treatment improves the properties of the fabric related to soil release, durable press, abrasion resistance, and pilling resistance (abstract), then Vigo et al. teaches a chemical treatment to achieve the claimed properties, regardless of the type of chemicals used to produce the claimed properties.



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The applicant also argues that Vigo et al. does not enable all of the improved characteristics because Vigo et al. does not use chemical compounds which specifically enhance pill resistance (Appeal Brief, page 9). When the reference relied on expressly anticipates or makes obvious all of the elements of the claimed invention, the reference is presumed to be operable. Once such a reference is found, the burden is on applicant to provide facts rebutting the presumption of operability. *In re Sasse*, 629 F.2d 675, 207 USPQ 107 (CCPA 1980). However, the applicant has provided no evidence to support that statement. Without such evidence demonstrating that the chemicals taught by Vigo et al. do not improve the pilling resistance of the fabric, even if that property is an unappreciated side effect of the reference teaching, the reference is still considered to teach those properties. In other words the applicant has not provided sufficient evidence to show that the prior art doesn't improve the pilling resistance of a treated fabric. Thus, the rejection is maintained.

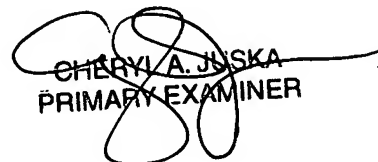
For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Jenna-Leigh Befumo
February 1, 2005

Conferees
Terrel Morris - 
Rena Dye - 

Terry T. Moyer
P.O. Box 1927
Spartanburg, SC 29304


CHERYL A. JUSKA
PRIMARY EXAMINER